STRAITS SETTLEMENTS REPORTS.

PUBLISHED BY AUTHORITY

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J. S.S., POYSER, C.J. F.M.S. & AITKEN, J.

September 21, 1939.

RE V. S. MADAR & CO., PENANG *EX PARTE* ASSISTANT CONTROLLER OF LABOUR, PENANG, ON BEHALF OF ABDULRAHMAN AND 276 OTHER LABOURERS.

[PENANG CIVIL APPEAL No. 1 of 1939]

Bankruptcy Ordinance—Appeal against receiving order—Extension of time for appealing—Bankruptcy Rule 90—Civil Procedure Rules O. 55 r. 2 (3).

When there is an appeal against a receiving order notice must be served on the petitioning creditor.

In re Webber, Ex parte Webber,(5) followed.

A single Judge has no jurisdiction to extend the time for appealing. **S. Muthucumaru v. Alkaff & Co.,**(3) followed.

Cases referred to:—

(1) *Debtor, In re a,* (1936) Ch. 292.

(2) *Debtors The,* 92 L. J. Ch. 120.

(3) *Muthucumaru, S. v. Alkaff & Co.,* (1933) S.S.L.R. 525, 2 M.L.J. 27 (C.A.).

(4) *Ward, Ex parte,* 15 Ch. Div. 292.

(5) *Webber, Ex parte,* 24 Q.B. Div. 313.

APPEAL.

B. E. Ross for appellant.

C. O. Lim for respondent.

The facts and arguments sufficiently appear from the judgments below.

McElwaine C.J., S.S. This is an appeal against the refusal of Howes J. to set aside a receiving order made on the 12th day of June, 1936, on the petition of the Assistant Controller of Labour, Penang, a creditor.

On the 24th March, 1939, counsel for V. S. Madar, a partner of V. S. Madar & Company moved "for an order that the receiving order made herein against the debtor firm abovenamed and all proceedings subsequent thereto may be rescinded and annulled on the ground that the petition herein was never served on the said firm". The motion was dismissed on the 31st March 1939. I understand that notice of this motion was served on the Assistant Controller of Labour, Penang, who did not appear nor was he represented before Howes J.

On the 12th May, 1939, Aitken J. made an order extending the time to appeal against the order of Howes J. It appears from the record that the Assistant Controller of Labour was not served with notice of this motion.

On the 19th May, 1939, a notice of appeal addressed to the Official Assignee, Penang, was issued. This notice was not addressed to the petitioning creditor the Assistant Controller of Labour nor is there any evidence that the petitioning creditor received any notification that this appeal was being brought.

The petitioning creditor is a party directly affected by the appeal and he must be served under O. LV. r. 2(3). The petitioning creditor was served in *Ex parte Ward*(4) and the Court held that the trustee must also be served. In *In re Webber, Ex parte Webber*(3) Lord Esher M. R. said:—

> "When there is an appeal against a receiving order, and notice is served, as it must be, within the time limited by the Rules, on the petitioning creditor, notice shall in all cases be given to the Official Receiver."

The Master of the Rolls proceeded to point out that the purpose of notifying the official receiver is to enable him to assist the Court if he can; he must not be a partisan. But in my opinion the petitioning creditor is entitled to support the order which he has obtained. He is a partisan. It may well be that he knows more about the circumstances of the case than the Official Assignee whose function in such an appeal as the present is that of *amicus curiae,* to prevent collusion as pointed out by Lindley L.J.

In each of the cases to which I have referred the petitioning creditor was made a party. In *The Debtors*(2) (on which Mr. Balfour Ross so strongly relied) the petitioning creditor was the respondent. Also, in *In re A Debtor*(1) the petitioning creditor was made a party to the debtor's appeal.

Bankruptcy r. 90 provides that the provisions and procedure for the time being in force respecting appeals from the Supreme Court in its ordinary jurisdiction shall apply to appeals in bankruptcy. It follows that O. LV. r. 2(3) is applicable and that the petitioning creditor must be served with notice of the appeal. He was not served with the notice and the appeal must be dismissed.

There is a further point. The Court of Appeal in *S. Muthucumaru v. Alkaff & Co.*[3] decided that a single Judge has no jurisdiction to extend the time for appealing. The order of Aitken J. was therefore invalid and there has been no effective leave to appeal out of time. For this reason also the appeal is not properly before this Court.

The Official Assignee took no part in the argument before us. There will be no order as to costs.

Poyser C.J., F.M.S. I agree, for the reasons stated by the President of the Court that the appeal was not properly constituted, and should be dismissed without costs.

Aitken J. Proceedings in this matter commenced with the following bankruptcy notice:—

"To,

V. S. Madar & Co. No. 141 Hutton Lane Penang.

Take Notice that within 7 days after service of this notice on you, excluding the day of such service, you must pay to H. Watson, Assistant Controller of Labour, Penang, the sum of $11,711.00 as being the amount due on a final judgment and costs being obtained by him against you in the District Court, Penang in Suit 1936 No. 958 dated the 24th day of April 1936 whereon execution has not been stayed, or you must secure or compound for the said sum to his satisfaction or the satisfaction of the Court or you must satisfy the Court that you have a counter-claim set-off or cross demand against the said H. Watson which equals or exceeds the sum claimed by him and which you could not set up in the action in which the judgment was obtained.

Dated this 6th day of May 1936.

By the Court,
Sd. Tan Hock Ann,
Registrar."

It is objected to this bankruptcy notice that it is bad because it does not specify the address of the Assistant Controller of Labour at Penang, but in my opinion we can safely brush aside that trifling formal defect or irregularity under S. 128 of the Ordinance for this reason: that any one can easily discover where the Assistant Controller of Labour has his office in Penang, and therefore no substantial injustice could have been caused by the omission to state his official address. At the same time it is, of course, desirable to do so.

At the time when this bankruptcy notice was issued V. S. Madar & Co. had ceased to do business at Penang, and it was impossible to effect service on the firm in accordance with r. 219 of the bankruptcy rules because there was no principal place of business of the firm anywhere in the Settlement. Assuming, then, that the firm was a partnership firm as stated in the heading to the bankruptcy notice, the only way in which service thereof could be effected on the firm was to serve all the five persons named therein as partners. In point of fact this was neither done nor attempted, and V. S. Madar only was served with the bankruptcy notice on the 13th of May, 1936.

V. S. Madar did not comply with this bankruptcy notice, and on the 22nd of May, 1936, the following bankruptcy petition was filed in the High Court at Penang:—

"Re V.S. Madar & Co. Penang.

Ex parte:—Assistant Controller of Labour, Penang on behalf of Abdulrahman and 276 other labourers.

1. That the Assistant Controller of Labour, Creditor of Labour Office Penang, hereby petitions the Court that a Receiving Order be made in respect of the estate of V.S. Madar & Co. lately carrying on business at No. 61 Bishop Street Penang. That the said V.S. Madar has for the greater part of six months next preceding the presentation of this petition resided at No. 141 Hutton Lane, Penang, within the District of this Court.

2. That the said V.S. Madar & Co. are justly and truly indebted to me in the sum of $11,711.00 being the amount due on a final judgment obtained by me against the said V.S. Madar & Co. in the District of Penang in Cause No. 958 of 1936.

3. That I do not nor does any person on my behalf hold any security on the debtor's estate or any part thereof for the payment of the said sum.

4. That the said V.S. Madar & Co. within 6 months before the date of the presentation of this petition has committed the following act of bankruptcy, namely:—

"That on or about the 13th day of May 1936, he failed to comply with the terms of the bankruptcy notice dated the 6th day of May 1936 and served upon V.S. Madar on the 13th day of May 1936.

Dated 22nd day of May 1936.

Sd. H. Watson,
Asst: Controller of Labour, Penang.

Signed by the Petitioner in my presence on the 22nd day of May 1936.

Signature of witness: Sd. B. Rodrigues.

Address: High Court, Penang.

Description: Clerk.

Filed this 22nd day of May, 1936.

ENDORSEMENT.

This petition having been presented to the Court on the 22nd day of May 1936, it is ordered that this petition shall be heard at the Supreme Court Penang on the 5th day of June 1936 at 11 o'clock in the forenoon.

And you the said V.S. Madar are to take notice that if you intend to dispute the truth contained in the petition you must file with the Registrar of this Court a notice showing the

grounds upon which you intend to dispute the same, and send by post a copy of the notice to the petitioner, three days before the date fixed for the hearing.

This petition was issued by Mr. Watson, Assistant Controller of Labour, Penang."

This document is certainly not a very satisfactory bankruptcy petition. It begins by asking the Court to make a receiving order in respect of the estate of V. S. Madar & Co., and then continues with the assertion that V. S. Madar "has for the greater part of six months next preceding the presentation of this petition resided at No. 141 Hutton Lane, Penang", which is V. S. Madar's private address. So, too, the act of bankruptcy alleged against V. S. Madar & Co. is "that on or about the 13th day of May, 1936, he failed to comply with the terms of the bankruptcy notice dated the 6th day of May 1936, and served upon V. S. Madar on the 13th day of May, 1936". It is apparently suggested that V. S. Madar committed the necessary act of bankruptcy on behalf of the firm, and on the very day on which he, personally, was served with the bankruptcy notice.

This bankruptcy petition was served on V. S. Madar personally on the 3rd of June, 1936, and came on for hearing before Gordon Smith J. on the 12th of that month in the presence of the petitioning creditor, that is, the Assistant Controller of Labour at Penang and Mr. Gucharan Singh as counsel for V. S. Madar & Co. No one drew the learned Judge's attention to the absence of any effective service of either the bankruptcy notice or the petition on the firm of V. S. Madar & Co., assuming that it was a partnership firm as alleged in the bankruptcy notice; and on the same 12th of June, 1936, a receiving order was made against V. S. Madar & Co. and the Official Assignee was constituted the receiver of the debtor's estate.

On the 27th of June, 1936, V. S. Madar affirmed an affidavit in the matter of this receiving order which reads as follows:—

"1. I am a married man with 11 children and two wives.

2. The business of V.S. Madar & Co. started in October 1929 at No. 61 Bishop Street, Penang, as 'Stevedores, Dubash and boats supplier' with the following partners:—

1. Myself.
2. S. M. Ibrahim No. 88 Church Street, Penang.
3. M. Mohamed Ali Maricar, Aboo Sittee Lane, Penang.
4. S. Kader Mydin No. 88 Church Street, Penang.
5. M. Ibrahim, Aboo Sittee Lane, Penang.
6. V. H. Noordin now in India.

The partnership has not been dissolved at the date of the receiving order, 12th June, 1936.

3. The account books of the said partnership firm are in possession of S.M. Ibrahim who is the managing partner from the commencement of the said business up to the date of the bankruptcy of the said firm.

4. I am at present unable to say the exact liabilities of the said firm as the account books are not in my possession, but approximately it may be $50,000.00. There are no partnership assets with the exception of my own.

5. I have certain movable and immovable properties of my own both in Penang and in India, and the approximate value of these properties is $31,500.00 and they are under mortgage to the extent of $31,000.00.

6. I went to India in September 1934 and returned to Penang about September 1935, and during my absence the business was carried on by the other partners. When I left for India the business was solvent, and on my return I found that the business had not been properly managed and the affairs of the firm was in a bad state.

7. I have not been in partnership with anyone in any business except as stated in paragraph 2 hereof."

On the 22nd of July, 1936, V. S. Madar affirmed this further affidavit:—

"I, Vavana Sinda Madar of 141 Hutton Lane, Penang, do solemnly and sincerely affirm and say as follows:—

1. I crave leave to refer to my affidavit affirmed and filed herein on the 27th June 1936.

2. I am one of the partners of the above-named firm in bankruptcy against which a receiving order only was made on 12th June 1936, and I consent to be adjudged bankrupt."

On the 14th of August, 1936, V. S. Madar was adjudged bankrupt on a motion by the Assistant Official Assignee and with his own consent. The Assistant Official Assignee also commenced certain proceedings under the Ordinance against three of the alleged partners mentioned in paragraph 2 of V. S. Madar's affidavit of the 27th of June, 1936, namely, M. Mohamed Ali Maricar, S. M. Ibrahim and S. Kader Mydin. I need not say anything more about these proceedings than this, that they were all withdrawn apparently because the Assistant Official Assignee was advised that the receiving order which had been made against the firm of V. S. Madar & Co. could not be supported in view of the decision of the English Court of Appeal in *The Debtors*[2]. It should, perhaps, be mentioned in passing that there is a long affidavit on the Court file of documents in this matter which M. Mohamed Ali Maricar affirmed on the 6th of August, 1936, and in which he strenuously asserted that V. S. Madar was the sole proprietor of the business of V. S. Madar & Co., and had on all occasions (except these bankruptcy proceedings) conducted himself as its sole proprietor. So far as I can discover no attempt has ever been made to solve the issue of fact raised by that affidavit.

I gathered from the answers which the Assistant Official Assignee gave in Court, at the hearing of this appeal, that he has not succeeded in collecting anything of value under the order of the 12th of June, 1936, constituting him the receiver of the estate of V. S. Madar & Co. I also gather, from the Court file of documents, that V. S. Madar has never yet filed a statement of his affairs, and according to his own affidavits there have been good reasons for his continued failure to do so for some considerable part, at any rate, of the period which has elapsed since his adjudication. It seems clear, however, that the Assistant Official Assignee's patience and forbearance came to an end about December 1938, and I have found, on the Court file, a process server's affidavit dated the 14th of February, 1939, which avers that he had served V. S. Madar on the 11th of that month with a letter from the Assistant Official Assignee dated the 10th of that month requesting him to file his statement of affairs within seven days. This letter was followed up by a notice of motion, dated the 23rd of that month, which required V. S. Madar to attend Court later on, and show cause why he should not be committed to prison for his failure to file a statement of his affairs.

Now it may or may not be a mere coincidence that on the same day, 23rd February, 1939, Mr. Hume, on behalf of V. S. Madar, filed the following motion paper:—

"Re: V.S. Madar & Co.

Ex parte:—Mr. H. Watson, Assistant Controller of Labour, Penang on behalf of Abdulrahman and 276 other labourers.

MOTION PAPER.

Mr. R. D. Hume of Counsel for Vanjoor Sinda Madar moves for an order that the receiving order made herein against the debtor firm abovenamed, and all proceedings subsequent thereto, may be rescinded and annulled on the ground that the petition herein was never served on the said firm and the Court had no jurisdiction to make a receiving order against the said firm.

Dated at Penang this 23rd day of February, 1939.

Sd. Hogan, Adams & Allan,
Solicitors for V.S. Madar."

This notice of motion and V. S. Madar's affidavit in support were duly served on the Assistant Controller of Labour at Penang, and on the Assistant Official Assignee. When the matter eventually came before Howes J. on the 24th of March, 1939, Mr. Hume appeared for V. S. Madar, Mr. Ong Huck Lim for some creditors (other than the Assistant Controller of Labour), and the Assistant Official Assignee attended on his own behalf; but there was no appearance by or on behalf of the Assistant Controller of Labour. After hearing what all these learned counsel had to say, the learned Judge reserved his decision until the 31st of March, 1939, when he read a written judgment dismissing V. S. Madar's application.

In the course of this judgment the learned Judge accepted Mr. Hume's contention that neither the bankruptcy notice of the 6th of May, 1936, nor the bankruptcy petition of the 22nd of May, 1936, had been duly served on the firm of V. S. Madar & Co. He also held that the receiving order made against the firm on the 12th of June, 1936, could not be supported because the firm itself, not having been served with the bankruptcy notice, had committed no act of bankruptcy. He then proceeded to discuss S. 128 of the Bankruptcy Ordinance and the decision of the English Court of Appeal in *The Debtors*[2] and came to the conclusion that the making of a receiving order against a firm which, in law, had committed no act of bankruptcy, was not a "formal defect" or an "irregularity" which could be disregarded by virtue of the provisions of S. 128 of the Bankruptcy Ordinance, though he was satisfied that it had caused no substantial injustice to any one.

Up to this point in his judgment the learned Judge's decisions on the questions of law raised by V. S. Madar's application were entirely in favour of the applicant, but the applicant was applying to the Court to exercise its powers under S. 90 ss. 1 of the Bankruptcy Ordinance which reads as follows:—

> "The Court may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

The learned Judge dealt with this subsection and his powers thereunder in the final passage of his judgment, which gives his reasons for refusing to rescind the receiving order of the 12th of June, 1936; it reads as follows:—

> "As the power to rescind an order under S. 90 ss. 1 is discretionary, I am entitled to consider the merits of the application, and these are non-existent.
>
> Firstly, the applicant does not move the Court as a member of the firm, but does so in his personal capacity;
>
> Secondly, since the applicant personally and with his consent has been adjudged bankrupt, his proper course was to apply to have the adjudication order annulled;
>
> Thirdly, both he and the other members of the firm acquiesced in the making of the receiving order and submitted to it;
>
> Lastly, both the applicant and the other members of the firm have been guilty of laches; and consequently, having slept on their rights for over 2½ years they have no claim at this stage to ask for the order to be set aside. The motion must be dismissed."

On the same date, that is, the 31st of March, 1939, a formal order was drawn up and signed dismissing V. S. Madar's application.

Section 90 ss. 2 of the Bankruptcy Ordinance provides as follows:—

> "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable."

Order 55, r. 3(1) of the Rules of the Supreme Court, 1934, provides as follows:—

> "No appeal from any order, whether interlocutory or final, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days."

From these enactments it seems to be perfectly clear:—

1 That V. S. Madar should have lodged his appeal within twenty-one days after Howes J. pronounced judgment and made an order dismissing his application, if he wished to appeal against such judgment and order; and

2 That if he allowed that period to elapse without lodging an appeal, and then decided that he wished to appeal, he had to obtain special leave to appeal from the Court of Appeal.

In point of fact V. S. Madar failed to lodge his appeal within the prescribed period of 21 days, and has not applied to the Court of Appeal for any special leave to appeal against the Order of Howes J. dismissing his application for rescission of the Receiving Order against the firm of V. S. Madar & Co. and the annulment of his own adjudication as a bankrupt, what he did (through his Solicitors) was to file the following *ex parte* Notice of Motion in the High Court of the Straits Settlements at Penang:—

"IN BANKRUPTCY No. 84 of 1936.

Re: V.S. Madar & Co.

Ex parte:—Mr. H. Watson, Assistant Controller of Labour, Penang on behalf of Abdulrahman and 276 other labourers.

NOTICE OF MOTION.

TAKE NOTICE that this Honourable Court will be moved on Friday the 12th day of May 1939, at the hour of 11 o'clock in the forenoon or so soon thereafter as Counsel can be heard, by Mr. Balfour Earl Ross Counsel for Vanjoor Sinda Madar one of the partners of the abovenamed Bankrupt Firm for an order on the grounds stated in his affidavit affirmed and filed herein this 10th day of May 1939 that notwithstanding the time limited by O. 55 r. 3 of the Rules of the Supreme Court 1934 has expired he may be at liberty on or before the 19th day of May 1939 to serve and set down for hearing a Notice of Appeal from the judgment made in the above matter dated the 31st day of March 1939.

Dated at Penang this 10th day of May 1939.

Sd. Logan, Ross & Samuel,
Solicitors for the abovenamed
Vanjoor Sinda Madar."

This Motion came on before me on the 12th of May, 1939 and I made an order thereon purporting to give V. S. Madar leave to lodge an appeal against this order of Howes J. on or before the 19th of that month. In extenuation of that judicial act on my part it can be said that I was then entirely without experience of civil procedure in the Settlements and thought that I could discern a difficult question of law on which a Court of Appeal might take a different view to that taken by Howes J. No one drew my attention to the enactments which I have set out above, or to the case of *S. Muthucumaru v. Alkaff & Co.*[3] about which I shall have something to say later on; and I assumed that the learned counsel, who appeared in support of the motion, had satisfied himself that the procedure he had adopted was in accordance with the law.

As a result of this order of mine of the 12th of May, 1939 V. S. Madar's Solicitors, on the 19th of May 1939 gave notice of Appeal against the whole of the Order made herein by Howes J. on the 31st of March, 1939, to the Official Assignee at Penang, but not to the Petitioning Creditor who is the Assistant Controller of Labour at Penang, and it was in such circumstances and by such means of approach that this matter came before the Court of Appeal here on the 28th of August, 1939.

Now assuming, for a moment, that this appeal is properly before us, it still seems to me that it raises a substantial and difficult point of law which may be expressed thus:—in view of the fact that the Receiving Order against the firm of V. S. Madar & Co. cannot be supported and should not have been made, was there any material before Howes J. on which he could properly exercise his discretion under S. 90(1) of the Bankruptcy Ordinance and refuse to rescind that order. I am also by no means sure, after a careful study of all the documents on the Court file, that V. S. Madar's application to have it rescinded is so entirely without merits as the learned Judge thought it to be, because it seems quite possible that V. S. Madar's partners—if there are partners—may have brought about the bankruptcy of the firm and then left him to bear the whole of the burden. That, at any rate, is his contention and there appears to be some documentary evidence in support of it. Unfortunately, however, it seems impossible to escape the conclusion that his appeal is not properly before us, and for several reasons which are good in law.

These reasons are as follows:—V. S. Madar, being out of time, could only appeal against the order

of the 31st of March, 1939, by special leave of the Court of Appeal, and he did not get it. Even if we could overlook the failure to serve the Notice of Motion of the 10th of May, 1939, on the Official Assignee and the Petitioning Creditor—which I do not think that we can do, and then, having done so much for the applicant, could do even more by treating it as a motion in the Court of Appeal and before a single Judge of that Court, yet our efforts would avail him not at all because a single Judge of the Court of Appeal has no jurisdiction to make an order extending the time within which an appeal to that Court must be lodged.

So it was laid down and decided in *S. Muthucumaru v. Alkaff & Co.*,[3] and since S. 27 of the present Courts Ordinance exactly reproduces S. 1150 of the Civil Procedure Code which formerly applied to the Supreme Court of the Straits Settlements, that decision is still good law to-day. It may also be cited as an authority in support of the view, if any authority apart from the Rules of the Supreme Court 1934 is needed, that a notice of motion for special leave to appeal out of time must be served on the respondent or respondents, who are entitled to be heard in opposition thereto. In this matter any motion for special leave to appeal out of time to the Court of Appeal should have been served on the Official Assignee and the Petitioning Creditor, so that one or both of them could have been heard in opposition thereto if he or they so desired to be heard; and the failure to serve notice of appeal on the Petitioning Creditor is a plain contravention of the provisions of O. 55 r. 2(3) of the Rules of the Supreme Court 1934.

These mistakes in procedure are not only unfortunate but also substantial, and have prevented us from receiving the assistance which the Petitioning Creditor might otherwise have given us. They have also operated to deny the Petitioning Creditor his right to be heard, both on the application for an extension of time and at the hearing of the appeal; and we cannot possibly overlook mistakes in procedure which may have worked an injustice. I have been puzzled to account for them, and it may be that the *ex parte* application for an extension of time was due to a misunderstanding of the provisions of O. 55 r. (1) of the Rules of the Supreme Court 1934. It seems perfectly clear, however, that that rule only applies to cases where there is no right of appeal such as, for example decisions of the High Court under S. 36 of the Estate Duty Ordinance, and not to cases which are appealable by virtue of express statutory provisions. As to the failure to serve notice of appeal on the Petitioning Creditor, I can only suppose that the plain provisions of O. 55 r. 2(3) were disregarded *per incuriam*.

For all these reasons, which I have elaborated at some length, I am of the opinion that the intended appeal of V. S. Madar against the order of the 31st of March, 1939, is not properly before us, and that we cannot, at this stage, overlook or cure the various defects in the steps taken to bring it before us. The result is that it must be dismissed, but as the learned Assistant Official Assignee failed to draw our attention to any one of the defects in procedure on which this Judgment is based, I do not think that there should be any order as to costs.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

November 1, 1940.

KATHIRAYSAN RAJA GOPAL

v.

AHNA SEENA SUPAYA THEVAR & ANOR.

[SINGAPORE IN FORMA PAUPERIS SUIT No. 219 of 1940]

Judgment in favour of beneficiary against administrator for money unaccounted for—Subsequent claim by beneficiary against sureties to administration bond —Whether judgment against administrator binding upon sureties.

The plaintiff, a beneficiary in the estate of a deceased person, commenced administration proceedings against the administrator. In such proceedings certain accounts and enquiries were ordered to be taken and made and they were in fact taken and made, one result being that the Registrar certified that a sum of $6,031.20 had not been accounted for by the administrator. The plaintiff then claimed against the sureties to the administration bond the sum of $7,500.00 being the gross amount of the bond. At the trial it was however admitted that he could only recover the actual loss which the estate had suffered.

Held, that the judgment in the suit between the beneficiary and the administrator was not binding upon the sureties who were not parties to the proceedings and must be regarded as **res inter alios acta.** The amount of the debt or liability must, if the sureties insisted upon it, be proved against them just as it had to be proved if the action were against the principal.

Case referred to:—

(1) *Young, Ex parte: In re Kitchin,* 17 Ch. Div. 668, 674.

TRIAL OF ACTION.

R.D.W. Edwardes-Ker for plaintiff.

Philip Hoalim for defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. adv. vult.